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No. 84-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of Attorney Robert J. Snyder, Petitioner

BRIEF OF OHIO STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can disciplinary procedures of Court of Appeals constitutionally abrogate First Amendment rights of attorney?

INTEREST OF AMICUS

The Ohio State Bar Association is a voluntary association whose membership is open to all members of the Bar of Ohio. The organization has more than 17,000 members and is directed and managed by a 21 member Executive Committee elected by the membership. This Brief was authorized by unanimous vote of the Executive Committee.

The interest of the Ohio State Bar Association in this case is predicated upon its commitment to the position that the public has a right to and a need for information on the judiciary. Lawyers have the same rights and freedoms of all citizens including freedom of speech guaranteed by the First Amendment to the United States Constitution. Lawyers like other citizens are free to criticize the state of the law including rules of court, and no one shoud say that this sort

of criticism is an improper attack upon the judiciary.[1] Citizens can only properly evaluate the effectiveness of the judiciary if there is no unreasonable restriction on free speech of lawyers. The decision and order of the Court below, suspending Petitioner from practice, will impact upon lawyers' rights of free speech far beyond the reaches of North Dakota.

[1]There are now pending in the Supreme Court of Ohio proposed rules of Court that would severely limit, under pain of disciplinary action, a lawyer's right to speak to the electorate about the qualifications of candidates for judicial office.

ARGUMENT

The Court below has suspended petitioner from the practice of law in the federal courts of the United States Court of Appeals for the Eighth Circuit for a period of six months (or more) for remarks made by petitioner in a private letter to the Secretary of the United States District Court for the District of North Dakota. The basis of the suspension was that the remarks were disrespectful to the court. The remarks, in essence, complained of the small fees paid to a lawyer for indigent defense work and the added work to document entitlement to a fee. He concluded his letter by saying he would not send the court anything else, and the court could "take it or leave it." Of course, the court could have left it, and denied the fees. Instead, for this remark (and his refusal to apologize), after hearing, petitioner was suspended from practice. His request for a rehearing by the full Court of Appeals was denied.

Whether or not petitioner's conduct was of sufficient seriousness to be grounds for such drastic action (*see In re Sawyer,* 360 U.S. 622 (1959)), requires a consideration of the protection afforded by the First Amendment to the United States Constitution. It is indisputable that attorneys retain this constitutional protection even as participants in the judicial process. *In re Halkin,* 598 F.2d 176-187, *In re Primus* 436 U.S. 412, 431-32 (1978).

In a long line of cases this court has held that when government regulates activities in an area protected by the First Amendment, the regulations must be narrowly drafted to eliminate a specified evil and must not unnecessarily intrude on protected speech. See e.g. *In re R.M.J.* 455 U.S. 191 (1982); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 U.S. 743, 769-70 (1976); *Bigelow v. Virginia,* 421 U.S. 809, 827-829 (1975).

These cases make it clear that a person's right to freedom of speech guaranteed by the Constitution of the United States is no less by reason of having a license and privilege to practice law. It is only in those instances where unbridled speech amounts to misconduct which threatens a significant state interest that government may restrict a lawyer's exercise of rights guaranteed by the Constitution. We do not suggest, nor do the cases hold, that an attorney's right of free speech is absolute. But resting disciplinary action upon "disrespectful language" in an out of court communication is too insubstantial a base to withstand judiciary scrutiny. "Preventing a potential loss of respect by citizens for our legal institutions is not a sufficiently compelling governmental interest to justify restrictions on speech." *Bridges v. California* 314 U.S. 252, at 270 (1940).

In the instant case the "citizens" would never have known about the language had the Court not made it public. It is also probable that a "citizen" would not see that language as disrespectful. Harsh and strident, yes, but not disrespectful.

The lawyer's role as an officer of the court is to protect the fairness of proceedings. While attorneys also have some responsibility for insuring public confidence in the legal system, the system's public image cannot be protected at the cost of shielding either judges or the law itself from criticism. *In re Hinds,* 449 A. 2d 483 (N.J.). As Justice Black stated in *Bridges v. California, supra,* "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and an enforced silence, however limited, solely in the name of preserving dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." 314 U.S. at 270-71.

Bitterly complaining about the complex red tape requirements to obtain a meager but well-earned fee is hardly disrespectful. And, when a court disciplines an attorney for writing as Mr. Snyder did, and refusing to apologize, it inhibits all attorneys from doing their duty to improve the system, to speak out when they should.

It is also quite possible that criticism of judges, or of the law, or of the administration of the law, may in fact be deserved. If this is so, and it clearly appears to be so in this case, then the criticism will serve to improve rather than prejudice the administration of justice. But of even greater importance in the constitutional context, there is no reason to believe critical statements about judges or the law, even when inaccurate, necessarily reduce the ability of our legal system to protect rights and do justice. *In re Hinds, supra,* at 501.

Attorneys are more knowledgeable than other citizens about the laws and how they are administered in our legal system. Attorneys often engage in disputes, and in doing so they can sometimes be assertive. There is room for disagreement on matters of taste and judgement, but not as to the fundamental right to speak as any other citizen. Preventing attorneys from communicating their views on the subjects they know best would go a long way toward isolating our legal system from public scrutiny. That is a result that a democracy should not tolerate.

CONCLUSION

The chilling effect of aggressive professional discipline by courts seeking to insulate themselves from any criticism is a source of mounting concern to lawyers throughout the country. The interests of lawyers and judges will be best served if this Court holds that petitioner's letter was well within the bounds of permissible criticism, and within his rights of free speech under the First Amendment.

Lawyers must be free to criticize the law, the administration of it, and the judiciary. That freedom should not be restricted unless there is a clearly stated compelling governmental interest to do so.

It is also clear from the record submitted that the evidence was insufficient to support the order of suspension of petitioner from the practice of law. *In re Sawyer,* 360 U.S. 622 (1959).

Respectfully submitted,

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